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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 111

GLEN H. TAYLOR,

Petitioner,

vs.

CITY OF BIRMINGHAM, ALABAMA.

PETITION AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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ARGUMENT:

I—This record inescapably presents and demands decision of the questions whether the action of the Birmingham police, in enforcing racial segregation by forcibly denying petitioner ingress to the Tabernacle through the door marked "Negro entrance," and in arresting him for attempting to enter through that door, deprived him of the equal protection of the laws and violated his rights of free speech and free assembly secured by the Fourteenth Amendment 15

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II—The exertion of state power to require the segregation of the races at public or semi-public gatherings for the purpose of political discussion presents a question of great public importance, arising under the equal protection clause of the Fourteenth Amendment, not heretofore considered by this Court. The decisions of the Alabama courts in this case, sustaining this exercise of state power, are not in accord with the applicable principles established by prior decisions of this Court. *Plessy* v. *Ferguson,* 163 U. S. 537, is not applicable, or if held applicable, should be overruled 23

III—The exertion of state power to compel acquiescence in and compliance with racial segregation as a condition on the right to speak and assemble presents a question of great public importance arising under the due process clause of the Fourteenth Amendment, not heretofore considered by this Court. The action of the City in this case violated the guarantees of that Amendment, as construed and applied by this Court: (1) by imposing a previous restraint upon the exercise of petitioner's rights of free speech and free assembly, and (2) by attempting to exact from him an act of affirmation of individual opinion and belief 30

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama denying his application for a writ of certiorari to review the judgment of the Court of Appeals of Alabama which affirmed the judgment of the Circuit Court of Jefferson County, adjudging him guilty of disorderly conduct and sentencing him to a fine of $50 and imprisonment for 180 days at hard labor for the City of Birmingham (R. 23).

PART ONE

Summary Statement of the Matter Involved

The petitioner, a United States Senator, and the then Vice-Presidential candidate of the Progressive Party, was arrested on May 1, 1948, by the police of the City of Birmingham when, in response to an invitation to address a meeting of the Southern Negro Youth Congress, he attempted to enter the church where the meeting was held through a door marked "Negro entrance". The petitioner was thereafter prosecuted in the State Courts, convicted of disorderly conduct and sentenced as stated above. The crime of disorderly conduct is defined by Section 311 of the 1944 Code of the City of Birmingham, set out in full in Appendix A to this petition.

The petitioner contended below that while, in form, this proceeding was a prosecution for disorderly conduct, in fact it was an attempt by the authorities of the City of Birmingham to enforce the segregation ordinance of the City against the petitioner. The ordinance (Sec. 859 of the 1944 Code of the City of Birmingham) is set forth in full in Appendix B to this petition. Among other things, it provides:

(1) That it shall be unlawful for any person in charge of any hall or other indoor or outdoor place to permit, therein, any speech or educational or entertainment program of any kind unless such hall or other place has distinct and separate entrances, exits and seating or standing sections set aside for and assigned to white persons and Negroes, respectively.

(2) That it shall be unlawful for any member of one race to use or occupy any entrance, exit or seating or standing section set aside for and assigned to the use of members of the other race.

(3) That it shall be the duty of the chief of police and members of the police department to arrest any person guilty of violating the foregoing provisions.

In the State Courts, the petitioner challenged these provisions of the ordinance, as applied to him, and the action of the police in making the arrest on the grounds that they denied him the equal protection of the laws guaranteed by the Fourteenth Amendment and further denied him the rights of free speech and free assembly guaranteed by the due process clause of the same amendment.

This petition seeks a review by this Court of the decisions of the State Courts rejecting that challenge and sustaining the action of the police.

The judgment of the Circuit Court was entered on March 30, 1949 (R. 22); the judgment of the Court of Appeals was entered on January 10, 1950 (R. 201); rehearing was denied on February 7, 1950 (R. 209), and the judgment of the Supreme Court, denying certiorari, was entered on March 9, 1950 (R. 212).

The Facts

The petitioner is a United States Senator from the State of Idaho (R. 175), and at the time of his arrest was the candidate of the Progressive Party for Vice-President of the United States (R. 172). In response to an invitation to address a meeting of the Southern Negro Youth Congress, he arrived in the City of Birmingham on April 30, 1948, and on the evening of May 1st, proceeded to the Alliance Gospel Tabernacle, a Negro church, located on the corner of 16th Street and Seventh Avenue North, where the meeting was to take place (R. 175).

As appears from the photograph of the Tabernacle introduced in evidence by the petitioner (R. 37, 38), the main entrance to the building is on Seventh Avenue, connected by a short walk to the sidewalk of the street. It was ade-

quately lighted by lights from the interior of the building (R. 34) and was plainly the entrance used by the members of the congregation and their guests. A second entrance was located to the rear of the building along 16th Street. It was surrounded by grass and weeds, no walk connects it with the sidewalk and there appears to have been no light nearby (R. 63, 64). On the evening of May 1st, a sign had been placed over the main entrance reading "Negro entrance", while a sign reading "white entrance" had been placed over the door at the rear of the building (R. 42, 43).

There is little conflict in the testimony as to the events which followed petitioner's arrival at the meeting place. The petitioner's cab stopped in front of the building which faces on Seventh Avenue. A number of police officers and on-lookers were present on the street. After alighting from his cab, petitioner spent a few moments in conversation with some people who were there to greet him and then proceeded alone to the front entrance of the church for the purpose of entering and addressing the meeting (R. 176).

Police Officer Casey was stationed on the porch beside the front entrance (R. 41). Officer Casey testified that he stationed himself there at the instructions of the Chief of Police with orders to send white persons to the "white entrance" (R. 30, 43). The Chief told him, he testified, "Not to let any white trade go in that entrance" (R. 43).

As petitioner approached the entrance, Casey informed him that this was a colored entrance, and that he would have to use the white entrance around the corner (R. 30). Petitioner replied that he was not particular about such things and that he would use this entrance (R. 176, 120, 30). He advanced to the doorway, and as he did so Casey moved into the doorway so as to block his entrance (R. 45). Petitioner "brushed" or "bumped" with Officer Casey as he attempted to pass through the doorway (R. 83). Casey pushed him back. Petitioner made a second attempt to enter, and was again pushed back by Casey who this time

grabbed him around the waist, pinned his arms to his sides and attempted to move him from the porch (R. 78, 84, 134). Casey testified that at that point petitioner "was arrested" although he was not informed of his arrest (R. 48).

At this point Police Officer Badgett, who had witnessed the proceedings from below, rushed over to the side of the porch and pulled the petitioner to the ground (R. 134, 176). A number of policemen surrounded the petitioner, while Officer Badgett and a second officer held him on either side and proceeded to march him forcibly away from the building and toward the street (R. 47, 69, 74, 95, 97, 176).

As petitioner was being marched across the yard, he and the officers holding him tripped over a strand of barbed wire at the end of the sidewalk and fell to the ground (R. 34). In the tension of the moment, petitioner thought he had been assaulted by one of the officers (R. 176) and as he arose to his feet was heard to curse and say "you can't do this to me" (R. 136). There is some evidence that when he arose, he had his fist drawn back (R. 144), but the record is clear that he did not strike or attempt to strike anyone.

At this point a third police officer, McMahon, put his hand on petitioner's shoulder and for the first time informed him that he was under arrest (R. 144). However, petitioner was not informed of the charge (R. 153). He was ordered into a police automobile and driven off to jail (R. 144, 145).

The petitioner did not deny that he resisted the attempt to prevent him from entering the Tabernacle through the front door, or that he struggled to release himself from the grip of the police officers who were forcibly removing him from the premises. Nor did he deny that in the heat of the moment, he may have cursed, believing that he had been knocked down by the officers who were pushing and pulling him about, or that he rose, prepared to defend himself against what he believed to be further assaults (R. 176, 177).

Proceedings in the Recorders Court

After his arrest, petitioner was charged with disorderly conduct and convicted and sentenced in the Recorders Court in the City of Birmingham. He thereupon appealed to the Circuit Court of Jefferson County (R. 1).

Proceedings in the Circuit Court

Upon the trial *de novo* in the Circuit Court before a jury, the City filed a complaint charging the petitioner in separate counts with (1) disorderly conduct, (2) assault and battery, and (3) resisting an officer (R. 2). Before submitting the case to the jury, the Court instructed it that if it found the petitioner guilty, it could return a verdict on only one count of the complaint (R. 192). The jury returned a verdict of guilty on the disorderly conduct count and fixed the sentence upon which the Judge thereupon entered judgment (R. 22, 23).

In the Circuit Court, by a written motion to strike the complaint and affidavit in support thereof (R. 4-14), a special written plea (R. 15-20), a motion to exclude the evidence and instruct a verdict for defendant at the close of the City's case (R. 162, 166), a motion for a directed verdict at the close of petitioner's case (R. 25) and by appropriate requests for instructions to the jury (R. 26, 27), petitioner challenged the action of the police in barring his entrance into the Tabernacle and the provisions of Section 859 of the Birmingham City Code which, he contended, were being enforced against him in this proceeding, on the ground that the action of the police and the provisions of the Code denied him the equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the United States Constitution.

The Trial Judge repeatedly expressed the view that the proceeding before him was a "simple" misdemeanor case

wholly unconnected with and unrelated to the practice of racial segregation or the City ordinance declaring unsegregated meetings unlawful (R. 166, 174, 192). In conformity with this view, he overruled petitioner's motion to strike the complaint (R. 22), sustained a demurrer to the special plea (R. 22), denied the motion to exclude the evidence and for an instructed verdict (R. 166), refused to give the requested instructions (R. 25-27), declined to hear argument on the constitutional questions (R. 166), and excluded all evidence offered by the petitioner to corroborate his contention that the action of the police in barring petitioner's entrance into the church and in making the arrest was for the purpose of enforcing Section 859 of the City Code (R. 174).

PART TWO

Opinion of the Court of Appeals

The opinion is set forth in full at R. 201.

The Court of Appeals refused to consider a number of petitioner's assignments of error on the basis of asserted procedural defects in preserving them for consideration upon appeal.

It then proceeded to dispose of the case on its merits.

It is clear from the opinion that in the Court's view, the act for which petitioner was arrested, prosecuted and convicted consisted in his attempt to gain entrance into the church against the resistance of Police Officer Casey and that neither his subsequent use of profanity or his alleged "struggles" with the police were considered by the Court as elements of the offense (R. 207).

The Court rejects as "entirely without merit and wholly unsupported by the record" (R. 208) the petitioner's contention that the action of the police in barring his entry to the Tabernacle and in thereafter arresting and prosecuting him for disorderly conduct was for the purpose of enforcing Section 859(b) of the Birmingham Code. It, therefore,

does not reach a consideration of the constitutionality of that ordinance. Instead, it bases its decision on the following propositions:

1. "The church had a right to insist on segregation on their own property; * * * it had a right to post signs on the building designating a white and a Negro entrance without regard to a segregation ordinance" (R. 207).
2. "The jury had a right to find and doubtless found that this (the separation of entrances) was in accordance with the arrangements that had been made by the church for holding a meeting * * *" (R. 204).
3. "If the petitioner sought to force his way into the building in a way and manner contrary to the arrangements that had been made by the church, he might be regarded as a trespasser *ab initio*. Such conduct had a tendency to bring about a breach of peace" (R. 207).

We shall show in the argument in support of this petition that these propositions have no basis in fact or law. But, even accepting the Court's analysis and assuming (1) that the segregation of entrances was the voluntary act of the church and (2) that its action and that of the police were unrelated to Section 859, the fundamental constitutional issues are still inescapable: Did the action of the police, in enforcing the "voluntary" arrangement made by the church by barring petitioner's entry to the meeting hall through the door marked "Negro entrance" and making the arrest, deny him the equal protection of the laws and the rights of free speech and free assembly guaranteed by the Fourteenth Amendment?

Following the decision of the Court of Appeals, petitioner filed a petition for rehearing which was denied on February 7, 1950, without opinion (R. 209).

Petitioner then filed a petition for certiorari in the Supreme Court of Alabama which was denied on March 9, 1950 (R. 211, 212).

PART THREE

Jurisdiction

Jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257, petitioner claiming rights under the Fourteenth Amendment to the Constitution, which rights were denied by the State Courts.

PART FOUR

Questions Presented

1. Did the action of the Birmingham police, in forcibly denying the petitioner entry to the Alliance Gospel Tabernacle through the door marked "Negro entrance", and in arresting him when he sought to enter, deny him the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States?

2. Did the action of the Birmingham police, in forcibly denying petitioner entry to the Alliance Gospel Tabernacle, for the purpose of assembling with and addressing those within, through the door marked "Negro entrance", and in arresting him when he sought to enter, deny him the rights of free speech and free assembly in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States?

3. Did Section 859 of the General City Code of Birmingham, making it unlawful for any member of one race to use any entrance set aside for and assigned to the use of members of another race, as that section was applied and enforced against petitioner by the Birmingham police, deny him the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States and free speech and free assembly guaranteed by the due process clause of that amendment?

PART FIVE

Reasons Relied on for Allowance of the Writ

I

This case presents a federal question of substance not heretofore determined by this Court: Whether the exercise of State power (through a local ordinance and/or coercive action by the police) to require the segregation of the races at meetings held to discuss political or other public questions, through the compulsory use of separate entrances, denies the equal protection of the laws under the Fourteenth Amendment and violates the rights of free speech and free assembly guaranteed by the due process clause of that amendment.

II

The decisions of the Alabama Courts in this case sustaining the authority of the police of the City of Birmingham to enforce racial segregation through the compulsory use of separate entrances to a meeting place are not in accord with the decisions of this Court holding that the exercise of State power to compel the segregation of the races denies the equal protection of the laws guaranteed by the Fourteenth Amendment. The decision of this Court in *Plessy* v. *Ferguson,* 163 U. S. 537, is inapplicable or, if found applicable, should be re-examined and overruled.

III

The decisions of the Alabama Courts in this case sustaining the authority of the Birmingham police to require petitioner to acquiesce in racial segregation, through the use of a segregated entrance, as a condition on the exercise

of his rights to speak and assemble are not in accord with the decisions of this Court holding that, in the absence of a clear and present danger, the due process clause of the Fourteenth Amendment prohibits the use of State power to impose a previous restraint on the exercise of these rights. Nor are they in accord with the decisions of this Court holding that the State is without power under the due process clause to compel an act of affirmation of belief, opinion or political attitude.

CONCLUSION

Wherefore it is respectfully submitted that this petition for writ of certiorari to review the judgment of the courts below should be granted.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1949

No.

GLEN H. TAYLOR,

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vs.

CITY OF BIRMINGHAM, ALABAMA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Opinion of the Court Below

The opinion of the Court of Appeals will be found at page 201 of the record and is officially reported at 45 So. 2d 53. The opinion of the Supreme Court denying certiorari will be found at page 211 of the record and is officially reported at 45 So. 2d 60.

Summary of the Argument [1]

1. Despite the efforts of the State Courts to avoid the constitutional issues, this record requires decision of the

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[1] Inasmuch as the petition contains a statement of the basis upon which the jurisdiction of this court rests and a statement of the pertinent facts, these are not repeated here.

questions whether the action of the Birmingham police, in enforcing racial segregation by forcibly denying petitioner ingress to the Tabernacle through the door marked "Negro entrance", deprived him of the equal protection of the laws and due process of law under the Fourteenth Amendment. Decision of these questions is required whether, as contended by petitioner, the police were acting under the authority of the Birmingham segregation ordinance (Sec. 859 of the 1944 Code of the City of Birmingham) or, as decided by the Court of Appeals, for the purpose of enforcing a "voluntary arrangement" made by the Tabernacle.

2. This case presents a question of great public importance arising under the equal protection clause of the Fourteenth Amendment. The exertion of State power to require the separation of the races at meetings, entertainments and similar gatherings through the compulsory use of separate entrances and seating arrangements is an integral part of the pattern of racial segregation and discrimination in the Southern States. The validity, under the equal protection clause, of the use of State power for this purpose has not heretofore been considered by this Court. The decisions of the Alabama Courts in this case are not in accord with the applicable principles established by prior decisions of this Court holding that related forms of compulsory segregation of the races violate the equal protection clause.

3. This case presents a question of great public importance arising under the due process clause of the Fourteenth Amendment. The effect of the action of the Birmingham police in this case was to condition petitioner's right to speak and assemble upon his compliance with, and acquiescence in, racial segregation. The validity of such a previous restraint, imposed by State power, upon the individual's right of free speech and free assembly guaranteed

by the due process clause of the Fourteenth Amendment, has not heretofore been considered by this Court. The decisions of the Alabama Courts in this case are not in accord with the applicable principles established by previous decisions of this Court, invalidating State-imposed restraints on the constitutional rights of free speech and free assembly, in the absence of a showing of clear and present danger. Nor are they in accord with decisions of this Court invalidating attempts by the State to compel the performance of an act of affirmation, violative of the individual's beliefs, opinions and convictions.

ARGUMENT

I

This record inescapably presents and demands decision of the questions whether the action of the Birmingham police, in enforcing racial segregation by forcibly denying petitioner ingress to the Tabernacle through the door marked "Negro Entrance", and in arresting him for attempting to enter through that door, deprived him of the equal protection of the laws and violated his rights of free speech and free assembly secured by the Fourteenth Amendment.

Despite the studied efforts of the State Courts to evade consideration or decision of these important constitutional questions, they emerge as the crucial and inescapable issues presented by this record.

Basic to any decision of this case is the answer to the narrow question: By what lawful authority, if any, did Officer Casey station himself in the doorway marked "Negro

entrance" and forcibly deny petitioner ingress to the meeting through that entrance?[2]

If Officer Casey acted without lawful authority, he was no better than a trespasser, and petitioner was within his rights in using reasonable force to resist Casey's unlawful action in order to gain entry to the Tabernacle. *Sanders* v. *State,* 181 Ala. 35, 61 So. 336; 4 American Jurisprudence 148; *Mazell* v. *State,* 13 Ala. App. 156, 68 So. 578.

Under such circumstances, his encounter with Casey would not constitute an offense, Casey's action in arresting him was unlawful, and the charge against him should not have been submitted to the jury.[3]

By what authority then did Casey act?

A. Casey acted pursuant to the segregation ordinance, Section 859(b) of the Birmingham City Code.

Petitioner vigorously contended below that Casey acted, and could only have acted, by virtue of the authority of the Birmingham segregation ordinance, Section 859(b) of the 1944 City Code (Appendix B); that this section is a nullity because on its face, and as applied against petitioner, it

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[2] The opinion of the Court of Appeals states that, "It clearly appears that the police did not use force to prevent defendant's entry to the Tabernacle" (R. 208). This conclusion is pure sophistry in the face of the undisputed facts that the police (1) physically blocked the doorway, (2) seized petitioner around the waist and arrested him when he attempted to enter, (3) dragged him away from the building, (4) ordered him into a police car, and (5) drove him off to jail.

[3] The Court of Appeals based its affirmance of the conviction exclusively upon the proposition that petitioner's attempt to enter the Tabernacle against Casey's opposition "had a tendency to bring about a breach of the peace" (R. 207) and constituted disorderly conduct. It is, therefore, unnecessary here to consider petitioner's conduct subsequent to his encounter with Casey or to show that, since it was provoked by and flowed from Casey's unlawful action, it could not ground the conviction. See: *City of Georgetown* v. *Scurry,* 90 So. Car. 346, 73 S. E. 353; *Pavish* v. *Meyers,* 129 Washington 605, 225 Pac. 633; *City of Jacksonville* v. *Headen,* 48 Ill. App. 60, 65; *Williams* v. *State,* 21 Tex. App. 256, 17 S. W. 624.

contravenes the equal protection and due process clauses of the Fourteenth Amendment, and hence that Casey's action was unlawful and the conviction cannot stand.

The City not only failed to establish the source of Casey's authority to act, but resisted every effort of petitioner to inquire into it, and was successful at the trial in excluding all evidence offered by petitioner concerning the ordinance and its relationship to the case (R. 102, 141, 149, 166, 168-171, 179, 180-181).

Nevertheless, the testimony which was admitted and the text of the ordinance itself clearly and irrefutably establish the fact that Casey acted under the authority of and for the purpose of enforcing Section 859(b) of the segregation ordinance.

The City conceded that the meeting at which petitioner was to speak was lawful in all respects, and that no orders had been given to prevent it from being held (R. 58, 168). It does not deny that petitioner's sole purpose in seeking to enter the Tabernacle was to speak to the people there assembled, or that until the moment he attempted to enter the doorway, his conduct was orderly, peaceful and entirely beyond reproach (R. 55).

It follows that Casey's action in barring petitioner's entry and subsequently seizing and arresting him could have been occasioned only by petitioner's attempt to enter the building through the door marked "Negro entrance".

Indeed, Casey himself testified that he was stationed at the doorway for the purpose of resisting such an attempt. He stated that he stationed himself there at the instructions of the Chief of Police with orders to send white persons to the "white entrance" (R. 44). The Chief told him, he testified, "not to let any white trade go in that entrance" (R. 43).

Casey further testified that while he did not inform petitioner that he was under arrest at the time he seized him, nevertheless "he was arrested" (R. 48).

In making that arrest, Casey was acting pursuant to the duty expressly required of all police officers under Section 859.

Paragraph (b) of that section provides:

> "It shall be unlawful for any member of one race to use or occupy any entrance, exit or seating or standing section set aside for and assigned to the use of the members of the other race."

Plainly, petitioner's attempt to enter the doorway marked "Negro entrance" was a violation of this paragraph. That being so, Casey was under the explicit duty to make the arrest, under paragraph (e) of Section 859 which provides:

> "The Chief of Police and members of the Police Department shall have the right, and it *shall be their duty,* to disperse any gathering or assemblage in violation of this section, and *to arrest any person guilty of violating the same.*" (Emphasis supplied.)

Casey's arrest of petitioner was thus not only authorized but expressly required by the ordinance. In the absence of evidence to the contrary, it will be presumed that he, as a police officer, performed the duty imposed on him by law.

No evidence was offered by the City to overcome this presumption. The conclusion is inescapable that Casey acted pursuant to and that his authority to make the arrest derived from Section 859(b). Petitioner's challenge of the constitutionality of that section, on its face and as applied to him, is, therefore, the primary and decisive issue in this case.[4]

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[4] The Court of Appeals remarked in passing that if bumping into Casey "was appellant's idea of 'testing' the ordinance, it was a method not available to him" (R. 206). The Court does not indicate why the time-honored method of testing the constitutionality of a law by violating it was not available to petitioner. Nor does it suggest any other method. Indeed, there was none. Petitioner was confronted with the choice of attempting to enter the church over Casey's opposition or abandoning the effort to vindicate what he believed to be his constitutional rights. It was the action of the police which forced this choice upon him. Had they wanted to submit the ordinance to a peaceful and orderly test, they could have done so by permitting petitioner to enter the church unmolested and arresting him immediately thereafter when the violation was complete.

B. Even accepting the theory of the Court of Appeals that Casey acted, without regard to Section 859, for the purpose of enforcing a voluntary arrangement made by the church, the constitutionality of the exertion of state power for that purpose still requires decision.

The Trial Court avoided any consideration of the constitutionality of Section 859 on the stated ground that "the segregation question * * * is not present in these proceedings" (R. 166).

The Court of Appeals evidently took the view that the clear and fundamental issue presented by the admitted facts in this case could not so easily be by-passed. It was compelled to concede that the "segregation question" was an issue in the case and to attempt, by other means, to evade consideration of the vital constitutional issues raised by petitioner.

Despite the testimony of Officer Casey and the plain language of paragraph (e) of Section 859, the Court dismissed petitioner's contention that the action of the police was an attempt to enforce the segregation ordinance with the curt statement that this contention "is entirely without merit and wholly unsupported by the record" (R. 208). It then proceeds to elaborate a different theory, never theretofore suggested by the City or by the evidence, to explain the action of the police. That theory is based on the following premises:

(1) "The church had a right to insist on segregation on their own property; * * * it had a right to post signs on the building designating white and Negro entrances without regard to any segregation ordinance" (R. 207).

(2) "The jury had a right to find and doubtless found that this (separation of entrances) was in accordance with the arrangements that had been made by the church for holding the meeting * * *" (R. 204).

(3) "If the appellant sought to force his way into the building in a way and manner contrary to the arrangements that had been made by the church, he

might have been regarded as a trespasser *ab initio*. Such conduct had a tendency to bring about a breach of the peace" (R. 207).

We note, without extended argument, the fatal contradictions which completely demolish the Court's premises:

1. Section 859(a) provides that: "It shall be unlawful for any person in charge or control of any * * * hall * * * to which both white persons and Negroes are admitted, to cause, permit or allow therein any * * * speech, or educational or entertainment program whatsoever, unless such * * * hall * * * has entrances, exits and seating or standing sections set aside for and assigned to the use of white persons, and other entrances, exits and seating or standing sections set aside for and assigned to the use of Negroes * * *." The ordinance thus required those in charge of the church to segregate the entrances to the meeting under pain of criminal sanctions for their failure to do so. They were not at liberty to act, and could not have acted, "without regard to the segregation ordinance". The assumption of the Court of Appeals that they did is completely refuted by the plain provisions of the ordinance itself.

2. The Trial Judge refused to permit petitioner to show, through the testimony of the Police Safety Commissioner, that the latter had stated he would not permit the meeting of the Southern Negro Youth Congress to be held in the City of Birmingham unless the segregation ordinance was complied with (R. 168). The exclusion of this testimony was assigned as error (R. 199, Assignment VIII). The evidence shows that there were no signs over the entrances to the church during the afternoon meeting of the Southern Negro Youth Congress (R. 151). The Trial Court prevented inquiry into the events which occurred during the afternoon session of the Congress (R. 56, 150). However, petitioner alleged in his motion to strike the complaint, supporting affidavit and special plea (R. 7, 12, 18) and

offered but was not permitted to prove under his plea of the general issue (R. 174) that the minister of the church *was arrested in the afternoon for violating Section 859(a)* by reason of his failure to comply with its requirement for segregated seating arrangements, and was thereafter tried on this charge in the Recorders Court. The refusal of the Trial Judge to admit this evidence was assigned as error (R. 195, Assignment IV). Thus, the Court of Appeals' assumption that the church voluntarily made provision for separate entrances at the evening meeting "without regard to the segregation ordinance" is not only without any support in the testimony, but is clearly and patently contrary to the facts.

3. The Trial Court not only did not submit to the jury the question of the nature of the arrangements for the meeting made by the church, but repeatedly stated in its presence that racial segregation had nothing to do with the case, and so instructed it (R. 192). There is thus every reason to conclude that in obedience to its instructions the jury did not even consider this question, and no basis whatsoever for the Court's assumption that it "doubtless found" that the separation of entrances was in accordance with the church's voluntary arrangement.

4. There is no evidence in the record to establish how, if at all, petitioner would have "tended to bring about a breach of the peace" if he had been permitted, without opposition, peacefully to enter the door marked "Negro entrance". The Court's conclusion on this point is supported only by its assumption that the petitioner's "effort to override established custom" (R. 208) in and of itself tended to breach the peace.

Thus, the theory of this case advanced by the Court of Appeals in order to circumvent consideration of the constitutionality of the segregation ordinance ignores the facts and does violence to every reasonable inference which common sense would draw from them.

Even if we were to assume, however, that the premises upon which the Court of Appeals constructed its decision have any validity in law or fact, the posture in which it puts the case still renders a decision of the fundamental constitutional questions inescapable.

In effect, the Court of Appeals says that police action in arresting the petitioner was lawful and proper because his disregard of the arrangement made by the church for the segregation of entrances constituted a breach of the peace. By so holding, the Court disposes of, without consideration, the precise constitutional questions which petitioner presented for decision.

Concededly, in the absence of a segregation ordinance, the church would have had the right to post signs indicating segregated entrances to the building. The Fourteenth Amendment does not inhibit the action of private persons. However, the question which the opinion of the Court of Appeals poses, but utterly fails to answer, is the power of the State, under the equal protection and due process clauses of the Fourteenth Amendment, to exert its authority through its police officials and its courts to compel obedience to this voluntary arrangement. If petitioner's right to enter the door marked "Negro entrance" was protected by that amendment, then State action to enforce an arrangement designed to deny him that right was unlawful. *Shelley* v. *Kraemer,* 334 U. S. 1. There, this Court said (pp. 13, 20):

> "Here the particular patterns of discrimination and the area in which the restrictions are to operate, are determined in the first instance, by the terms of agreements among private individuals. Participation of the state consists in the enforcement of the restrictions so defined. * * * State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands."

The assertion by the Court of Appeals that disregard of the arrangement for separate entrances would have disturbed the peace, even if that were the fact, could not confer authority on the State to deny rights protected by the Federal Constitution. *Buchanan* v. *Warley,* 245 U. S. 60, 80, and see *post,* p. 27 of this brief.

It follows, therefore, that either under the view of this case contended for by petitioner, or under that evolved by the Court of Appeals, the fundamental constitutional questions asserted by petitioner cannot be avoided and are now before this Court for decision.

As this Court has declared: "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand." *Smith* v. *Texas,* 311 U. S. 128, 132.[5]

II

The exertion of state power to require the segregation of the races at public or semi-public gatherings for the purpose of political discussion presents a question of great public importance, arising under the equal protection clause of the Fourteenth Amendment, not heretofore considered by this Court. The decisions of the Alabama courts in this case, sustaining this exercise of state power, are not in accord with the applicable principles established by prior decisions of this Court. *Plessy* v. *Ferguson,* 163 U. S. 537, is not applicable, or if held applicable, should be overruled.

In his memorable and eloquent dissent in *Plessy* v. *Ferguson,* 163 U. S. 537, Mr. Justice Harlan said (p. 557):

> "If a state can prescribe as a rule of civil conduct, that white and blacks shall not travel as passengers

[5] Cf. *Terminiello* v. *Chicago,* 337 U. S. 1, where a majority of this Court did not hesitate to thrust aside procedural infirmities in order to reach and vindicate fundamental constitutional liberties, even where these were invoked to shield incitements to race hatred.

> in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? * * * And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day?"

The situation which Mr. Justice Harlan cited as the *reductio ad absurdum* of the *Plessy* decision is now before the Court in this case. The City of Birmingham, in the exercise of State power, has here prescribed "as a rule of civil conduct" that the two races may not commingle at an assemblage of a public nature "convened for the consideration of the political questions of the day". The City enforced that rule against petitioner and arrested him when he attempted to violate it, believing that the rule denied him the equal protection of the laws.

The question thus presented is, for the first time, before this Court for decision.

This Court has had frequent occasion to measure the validity of State action erecting barriers of discrimination and segregation between the races against the command of the equal protection clause: in the selection of juries (*Strauder* v. *West Virginia,* 100 U. S. 303; *Norris* v. *Alabama,* 294 U. S. 587; *Hill* v. *Texas,* 316 U. S. 400); in the right to hold or occupy real estate (*Buchanan* v. *Warley,* 245 U. S. 60; *Shelley* v. *Kraemer,* 334 U. S. 1); in education (*Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sipuel* v. *Board of Regents,* 332 U. S. 631); in the right of suffrage (*Smith* v. *Allwright,* 321 U. S. 649).

At this term, the Court has again evidenced its continuing concern with the impact of State segregation laws upon the rights of the Negro people under the equal protection clause to full equality of treatment in education and interstate transportation by consenting to review the cases of *Sweat* v. *Painter et al.,* No. 44; *McLaurin* v. *Oklahoma State Regents,* No. 34, and *Henderson* v. *United States,* No. 25.

Yet the Court has never had occasion to consider the validity of State action requiring the segregation of the races at gatherings held for a discussion of public questions, entertainment, etc. Nonetheless, this form of segregation is an integral part of the pattern of discrimination against the Negro people. It is, if anything, more pernicious—because it is, perhaps, even more pervasive—than those forms of discrimination with which the Court has had occasion to deal. It enforces a caste system against every Negro; it brands him with the stigma of racial inferiority, not only when he seeks education, or attempts to vote, or is charged with crime, or acquires real estate, but almost every day of his entire life.[6]

Moreover, the form of segregation enforced in this case is closely associated with, and (as we shall point out later) places restraints upon the fundamental rights of free speech and free assembly.

We submit that the importance of the issue here presented, which is one of first impression in this Court, demands the issuance of the writ.

The fact that here it was a white person, and not a Negro, who was the victim of the State's discriminatory action in no wise diminishes the importance of the case or weakens the claim of constitutional right here invoked. That contention was made in *Buchanan* v. *Warley,* 245 U. S. 60, and rejected by the Court (pp. 72, 73):

> "The objection is made that this writ of error should be dismissed because the alleged denial of constitutional rights involves only the rights of colored persons, and plaintiff in error is a white person. * * * This case does not come within the class wherein this Court has held that where one seeks to avoid the enforcement of a law or ordinance he must present a grievance of his own, and not rest the attack upon an alleged

[6] See the Report of the President's Committee on Civil Rights, *To Secure These Rights,* p. 82; Johnson, *Patterns of Negro Segregation,* p. 318. "Segregation has become the cornerstone of the elaborate structure of discrimination against some American citizens." *To Secure These Rights,* p. 81.

violation of another's rights. In this case, the property rights of the plaintiff in error are directly and necessarily involved."

So here, the liberty of petitioner is "directly and necessarily involved". His standing to raise the constitutional question is in no wise impaired by the fact that, as a white person, he was the object of State action designed to discriminate against the Negro people.

On the contrary, the very fact that petitioner is white serves dramatically to demonstrate that compulsory racial segregation infringes the civil rights of the white person, as well as the Negro. For it denies to those white citizens who, like petitioner, desire freely to assemble and associate with Negroes the right to do so. It discriminates against the growing number of white Americans who utterly reject the doctrine of racial superiority as false, undemocratic and alien to all that is best in the American tradition.[7] It penalizes those whites who wish voluntarily to practice the principle of racial equality which the Fourteenth Amendment was designed to secure and which has now become a part of international law, setting a pattern of conduct for all nations.[8]

Moreover, the enforced separation of the races, by denying to *all* white persons the possibility of freely associating with Negroes, stunts their development as democratic citi-

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[7] Indeed, state intervention is increasingly required to enforce segregation, precisely because the *mores* are becoming increasingly inadequate for that purpose. Thus, Charles S. Johnson suggests that "segregation laws tend to appear where there is erosion of custom". *Patterns of Negro Segregation*, p. 318. And see *Myrdal, An American Dilemma*, Vol. 1, p. 580. An examination of laws governing race relations since the Civil War indicates that Jim Crow regulations in the South have become more minute in specification and more rigorous in application with each acceleration of the rate of cultural change. See Mangum, Jr., *The Legal Status of the Negro*.

[8] *Charter of the United Nations;* Article 1, Section 3; Article 13, Section 1b; Article 55(c). *Universal Declaration of Human Rights*, passed and proclaimed by the General Assembly of the United Nations, December 10, 1948, Article 2, Section 1; Article 7.

zens and deprives them of the experience which would expose the complete falsity of the premises on which racial supremacy rests and the grave injury it does to those who practice it as well as to those upon whom it is practiced. As the authors of *To Secure These Rights* stated (p. 83): "• • • where the artificial barriers which divide people and groups are broken, tension and conflict begin to be replaced by cooperative effort and an environment in which civil rights can thrive."

Nor is there validity to the claim that the action of the police in barring petitioner's entry into the meeting and in arresting him when he attempted to enter was necessary to preserve the public peace.

As we have already shown, the threatened or actual breach of the peace, if any, was not occasioned by petitioner, but by the illegal action of the police in barring his entry into the Tabernacle. Had they permitted petitioner to enter unhindered, and then arrested him for violating the ordinance, no breach of the peace would have occurred.

Indeed, the Court of Appeals concedes that what it calls the "tendency" to a breach of the peace resulted only from petitioner's failure to observe the practice of segregation (R. 207) and from what it calls his "effort to override established custom" (R. 208).

In any case, if the Fourteenth Amendment protected petitioner's right to enter through the "Negro entrance", the fact (if it were a fact) that his exercise of that right tended to disturb the peace did not warrant the police in preventing its exercise or in arresting petitioner when he attempted to exercise it.[9] As this Court said in *Buchanan* v. *Warley, supra* (p. 80):

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts.

[9] *Winkler* v. *Maryland*, 69 A. 2d 674, cert. denied March 27, 1950, 94 L. Ed. 505, is not to the contrary since the decision of the Court of Appeals of Maryland in that case hinged on the special characteristics of Maryland procedure which prevented the Court from reviewing the weight or legal sufficiency of the evidence.

> Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights granted or protected by the federal constitution."

This case, therefore, squarely presents the question whether the arbitrary separation of persons in public places on the basis of color alone, enforced by municipal authorities who exercise State power, can be sustained under the mandate of the Fourteenth Amendment which declares that:

> "no state shall * * * deny any person within its jurisdiction the equal protection of the laws."

We submit that the form of segregation enforced in this case clearly contravenes the equal protection clause under the applicable principles laid down by this Court in such cases as *The Slaughterhouse cases,* 109 U. S. 3; *Strauder* v. *West Virginia,* 100 U. S. 303; *Buchanan* v. *Warley,* 245 U. S. 60; *Shelley* v. *Kraemer,* 334 U. S. 1; *Smith* v. *Allwright,* 321 U. S. 49.

The only argument to the contrary bases itself on this Court's decision in *Plessy* v. *Ferguson,* 163 U. S. 537, holding that "separate but equal" treatment of white and Negro persons satisfies the constitutional requirement.

We submit that the doctrine of the *Plessy* case has no application here.

If, as petitioner contends, the City police were acting under the authority of the Birmingham segregation ordinance in barring petitioner's entry to the Tabernacle and making the arrest, and hence that the constitutionality of the ordinance is before this Court, the provisions of the ordinance fail to meet the test of the *Plessy* doctrine. The State statute under consideration in that case provided that the railroad companies "shall provide *equal* but separate accommodations for the white and colored races" (163 U. S. 537, 540). The City ordinance imposes no such requirement of equal facilities upon those who are in charge

of or control halls, theatres, and the like. It requires "separate" entrances and seating arrangements but makes no provision that such facilities shall be "equal". On its face, therefore, the ordinance fails to withstand the *Plessy* test.

On the other hand, if, as the Court of Appeals contended, the action of the police was without regard to the segregation ordinance but merely to prevent a threatened breach of the peace, the City stands in no better position with reference to the doctrine of the *Plessy* case. The ordinance proscribing disorderly conduct simply defines the common law crime. It prescribes no standard of "equal" facilities to govern the action of the police in a case of this character. Nor was there any showing that such a determination was in fact made by the police or that it grounded their action against petitioner.

Moreover, the record shows that the entrances to the Tabernacle were not, in fact, "equal" facilities. The "Negro entrance" was the main entrance, connected by a short walk to the sidewalk of the street on which the building fronted (R. 37, 38). It was adequately lighted by lights from the interior of the building (R. 34) and was plainly the entrance used by the members of the congregation of the church and their guests.

The "white entrance", on the other hand, was located at the rear of the building along a side street. No walk connected it with the sidewalk. It was surrounded by grass and weeds. There appears to have been no light nearby (R. 63, 64) and it was obviously a secondary entrance which would subject those who used it to annoyance and inconvenience.

Finally, the *Plessy* doctrine has been limited by this Court to segregation in common carriers. It should not be extended.

For these reasons, we submit that it is clear that the *Plessy* doctrine has no application here. Nevertheless, if the Court should hold it applicable, we urge that the decision in *Plessy's* case be re-examined and overruled.

Inasmuch as the unsoundness of the *Plessy* decision and the compelling reasons for its rejection have been fully and ably briefed and argued before the Court at this term (*Henderson* v. *U. S.,* No. 25; *McLaurin* v. *Oklahoma State Regents,* No. 34, and *Sweat* v. *Painter,* No. 44) we deem it necessary only to note our concurrence with the arguments pressed in those cases, without repeating them here.

Because, therefore, this case presents a question of grave public importance arising under the equal protection clause, and because the decisions of the Alabama Courts are in conflict with the applicable principles established by this Court, we respectfully submit that the writ should be granted and the case reviewed here.

III

The exertion of state power to compel acquiescence in and compliance with racial segregation as a condition on the right to speak and assemble presents a question of great public importance arising under the due process clause of the Fourteenth Amendment, not heretofore considered by this Court. The action of the City in this case violated the guarantees of that Amendment, as construed and applied by this Court: (1) by imposing a previous restraint upon the exercise of petitioner's rights of free speech and free assembly, and (2) by attempting to exact from him an act of affirmation of individual opinion and belief.

Petitioner came to the City of Birmingham for the purpose of making an address, as a Vice-Presidential candidate, before a meeting of the Southern Negro Youth Congress (R. 175). The meeting itself was in all respects peaceful and lawful (R. 158, 168) as was petitioner's conduct as he approached the doorway to the church for the purpose of entering to assemble with those within and to make his address (R. 55).

The City police, with full knowledge of the purposes which brought petitioner to the church, physically barred his entry through the door marked "Negro entrance". They prevented him from entering except through the "white entrance". They used the power of their office to exact his compliance with racial segregation as a condition on the exercise of his right to assemble with and address those within the church. They then enforced that condition by arresting him when he attempted to enter.

We submit that the action of the police placed a previous restraint upon the exercise of petitioner's right to speak and assemble, in violation of the due process clause of the Fourteenth Amendment.

For the purpose of a decision of this question, it is immaterial whether the police were acting pursuant to the authority of the Birmingham segregation ordinance or, as the Court of Appeals would have it, to enforce a voluntary arrangement for racial segregation made by the church. In either case, the question remains whether, consistent with the Fourteenth Amendment, State power may make the compulsory observance of racial segregation a condition upon the exercise of the rights of free speech and free assembly.

The question so presented is one of great public importance. It concerns those fundamental liberties which this Court has held occupy a "preferred place" in our constitutional scheme. It deals with these liberties in the context of an attempt by the State to curtail their exercise when they are invoked in behalf of another fundamental human right—the right of racial equality before the law.[10] This question has not heretofore been considered or decided by this Court.

We submit that the action of the police in this case suffers from a dual infirmity, rendering it clearly unconstitutional under the applicable principles established by previous decisions of this Court:

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[10] Cf. *Terminiello* v. *Chicago*, 337 U. S. 1, where the Fourteenth Amendment was successfully invoked to reverse a conviction for disorderly conduct based on the advocacy of racial hatred.

(1) The previous restraint placed upon petitioner's rights of free speech and free assembly is invalid because it cannot be justified or supported by any clear and present danger, actual or impending.

(2) The nature of the restraint, in and of itself, was an unconstitutional exaction of an affirmation of belief and opinion.

That the action of the police in forcibly denying petitioner entry into the church through the door marked "Negro entrance" constituted a restriction of and restraint upon his right to assemble with and speak to those within cannot be disputed.

The standard by which the restraint so imposed must be measured and its constitutionality determined was clearly set forth in *Thomas* v. *Collins,* 323 U. S. 516, p. 530:

> "* * * any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack, on due process grounds, will not suffice. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests give occasion for permissible limitation. It is, therefore, in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly."

Judged by these standards, the restrictions placed by the city police on petitioner's right of free speech and free assembly cannot survive. It cannot be argued that there is anything inherently dangerous in allowing white persons and Negroes who so desire to enter a meeting place through the same entrance, leave through the same exit,

and sit beside one another in listening to a speech. On the contrary, as we have shown above, racial segregation perpetuates racial antagonism, heightens racial tensions and increases rather than diminishes the possibility of public disturbance. As Mr. Justice Harlan pointed out in his dissent in *Plessy's* case (p. 560):

> "What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which in fact proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens."

Hence, the action of the police in this case can draw no support from the clear and present danger doctrine.

Nor can it be urged that the restraint is small and, seemingly, unimportant. Even were this the case, it would not justify the action of the police. As this Court said in the *Thomas* case, in striking down a statute requiring previous identification through registration as a condition on the right to speak (p. 542):

> "The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. There is some medium of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no state, nor all together, nor the Nation itself, can prohibit, restrain or impede. If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed upon the most basic rights of all."

The fact is that the restraint in this case was neither small nor unimportant. On the contrary, in and of itself (and apart from its invalidity as a previous restraint on free speech) it violated the due process clause of the Fourteenth Amendment.

The record shows that petitioner rejects the theory of racial superiority and is opposed to racial segregation

which is its expression and manifestation. He was not permitted to testify directly on this question (R. 181) or to state that it was his intention to advise the audience in the Tabernacle that he would not address a segregated meeting (R. 179), because the Trial Court believed that the question of racial segregation had no place in the case. Nevertheless, there is ample evidence in the record to establish petitioner's position. Petitioner's uncontradicted testimony is that when Casey directed him to the "white entrance", petitioner replied that he was "not particular about those things" (R. 176). The record further clearly establishes that it was the purpose of petitioner in seeking to enter through the "Negro entrance" to test the validity of the City segregation ordinance because he believed it to be unreasonable (R. 186, 185).

What the City sought to exact of petitioner when it commanded him to enter the church through the "white entrance" was the negation of his beliefs and principles by the compulsory performance of an act of acquiescence in racial superiority, an affirmation of belief in the inferiority of the Negro race. As we have shown above, the very purpose of segregation is to affirm the existence of a caste system and to mark the Negro people with a badge of inferiority. The separation of the entrances to the church had, and could serve, no other purpose. Had he entered the church through the "white entrance", petitioner, by his own conduct, would have evidenced his acquiescence in an attitude toward and opinion of the Negro people which is repugnant to him. That he might have entered voluntarily is, of course, beyond question. But the State was without power to compel conduct violative of his convictions.

An attempt by State action to compel a similar declaration of belief was struck down by this Court in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624. The Court there held that children could not, as a condition of attending public schools, be compelled to salute the flag of the United States. Although the children's refusal to participate in the flag salute ceremony was based on the dictates of their religion, the Court was careful to

state that its decision encompassed all of the rights protected by the First Amendment, and secured against State invasion by the Fourteenth (pp. 635-636):

> "The question which underlies the flag salute controversy is whether such a ceremony, so touching matters of *opinion and political attitude*, may be imposed on the individual by official authority under powers committed to any political organization under our Constitution." (Emphasis supplied.)

The Court thus rejected every State-compelled affirmation of belief, whether resting on religious conviction, political attitude, or other matters of individual opinion. It recognized, too, that affirmation of belief may be evidenced by acts as well as speech, by "signs" as well as "words"—and pointed out that the salute to the flag was a symbolic act expressing the giver's acceptance of the political ideas represented by the flag. In reaching these conclusions, the Court said (p. 633):

> "It (the state) requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights. * * * It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the state is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. * * * To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind left it open to public authorities to compel him to utter what is not in his mind."

So here, the Bill of Rights, which zealously guards petitioner's right to speak in support of racial equality, did not leave it open to the Birmingham authorities to compel him to deny his words by deeds or to perform an act of racial superiority in violation of his beliefs and professions.

We, therefore, submit that the decisions of the Alabama Courts sustaining the action of the Birmingham police decided a question of great public importance in conflict with the basic principles enunciated by this Court governing the rights of free speech and free assembly secured by the Fourteenth Amendment, and that, for this reason alone, the case should be reviewed here.

CONCLUSION

Despite the "ingenious or ingenuous" efforts of the State Courts to avoid decision of the basic constitutional issues, they are sharply and inescapably presented by this record. They involve the power of the State to discriminate, solely on the ground of race, in a vital sphere of activity, closely associated with the rights of free speech and free assembly. They also involve the power of the State to condition the right of individuals to speak and assemble upon compliance with racist practices that they reject, and to compel affirmation of racist doctrines that they abhor.

The questions so presented are of first impression in this Court. They involve issues of the highest importance to the vindication of democratic principles secured by provisions of the Constitution which are co-extensive with the international obligations our nation has now assumed under the Charter of the United Nations and the Universal Declaration of Human Rights.

For these compelling reasons, we respectfully submit that the petition for certiorari should be granted and the decisions of the Alabama Courts reviewed by this Court.

Respectfully submitted,

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APPENDIX A

General City Code of Birmingham

Disorderly Conduct Ordinance

SECTION 311.

Any person who disturbs the peace of others by violent or offensive conduct, or carriage, or by loud or unusual noises, or by profane or obscene or offensive language, or any person who shall commit any act or diversion causing or tending to a breach of the peace, or any person who shall be guilty of lewd, immoral or indecent conduct, or any person who shall use any obscene or filthy language in a public place, or any person who shall commit any act or diversion tending to or calculated to debauch the morals of any person, shall be deemed guilty of disorderly conduct, and, upon conviction, shall be punished as provided in section 4 of this code.

SECTION 4.

Any person who shall fail or neglect to perform any duty imposed by this code, or who shall fail or neglect to do or perform any act or series of acts required to be done or performed by this code, or who shall fail or neglect to perform any duty, act or series of acts, the neglect or failure of performance of which is declared unlawful or made punishable by this code, or who shall do or perform any act or series of acts which is prohibited, made unlawful, or made a misdemeanor by this code, or who shall violate any provision of this code, shall, upon conviction therefor, be punished by a fine not exceeding one hundred dollars or by imprisonment in the city jail, workhouse or house of correction or at hard labor upon the streets or public works for not exceeding six months, or by both such fine

and imprisonment; and, in the event the fine costs are not presently paid the defendant shall be required to work out the fine and costs under the direciton of the city authorities, allowing one dollar for each day's service. No female shall be required to work on the streets of the city. The penalties provided in this section shall apply in all cases other than offenses for which a different penalty is specifically prescribed; provided, that the provisions of this section shall not apply to violations of official duty imposed by this code upon officers or employees of the city as such, unless the provision imposing the duty also expressly makes the violation thereof unlawful or punishable.

APPENDIX B

General City Code of Birmingham

Segregation Ordinance

SECTION 859. SEPARATION OF RACES.

(a) It shall be unlawful for any person in charge or control of any room, hall, theatre, picture house, auditorium, yard, court, ball park, public park, or other indoor or outdoor place, to which both white persons and Negroes are admitted, to cause, permit or allow therein or thereon any theatrical performance, picture exhibition, speech, or educational or entertainment program of any kind whatsoever, unless such room, hall, theatre, picture house, auditorium, yard, court, ball park, or other place, has entrances, exits and seating or standing sections set aside for and assigned to the use of white persons, and other entrances, exits and seating or standing sections set aside for and assigned to the use of Negroes, and unless the entrances, exits and seating or standing sections set aside for and assigned to the use of white persons are distinctly sepa-

rated from those set aside for and assigned to the use of Negroes, by well defined physical barriers, and unless the members of each race are effectively restricted and confined to the sections set aside for and assigned to the use of such race.

(b) It shall be unlawful for any member of one race to use or occupy any entrance, exit or seating or standing section set aside for and assigned to the use of members of the other race.

(c) It shall be unlawful for any person to conduct, participate in or engage in any theatrical performance, picture exhibition, speech, or educational or entertainment program of any kind whatsoever, in any room, hall, theatre, picture house, auditorium, yard, court, ball park, public park, or other indoor or outdoor place, knowing that any provision of the two preceding subdivisions has not been complied with.

(d) The chief of police and members of the police department shall have the right, and it shall be their duty, to disperse any gathering or assemblage in violation of this section, and to arrest any person guilty of violating the same.[11]

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[11] See Section 4 of the City Code, *supra*, Appendix A, prescribing the penalty for violations of this section.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 111

GLEN H. TAYLOR,
Petitioner

vs.

CITY OF BIRMINGHAM, ALABAMA,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals of Alabama is officially reported at 45 So. 2d 53 and is set out in the record herein (R. 201). The opinion of the Supreme Court of Alabama denying certiorari is officially reported at 45 So. 2d 60 and is set out in the record herein (R. 211).

STATEMENT OF THE CASE

Through inaccuracies and omissions in the "Summary Statement of the Matter Involved" and "The Facts," as contained in the petition for writ of certiorari, the impression may have arisen that the petitioner was prosecuted and

convicted in the State Courts of disorderly conduct for attempting to enter a church where a meeting was being held through a door marked "Negro entrance." The record reveals that any such impression is completely erroneous. The record, as we will demonstrate hereinafter, shows clearly and unequivocally that the petitioner, upon reaching the church where the meeting was in progress, committed an assault and battery upon a uniformed police officer of the City of Birmingham, thereby committing a breach of the peace, and that petitioner's prosecution and conviction of disorderly conduct was based upon this activity and conduct of petitioner, as well as upon his using profane language and drawing his fist back as if to strike other police officers. We shall demonstrate that the record is clear that the prosecution of petitioner was neither in form nor in fact an attempt to enforce the segregation ordinance of the City of Birmingham against petitioner.

The petitioner arrived at the Terminal Station in Birmingham on the morning of May 1, 1948 (R. 65), and was there interviewed by a newspaper reporter (R. 65). Upon being asked by the reporter if he knew that the police commissioner of Birmingham might have him arrested if he violated the segregation law, the petitioner replied "The police commissioner can go to hell" (R. 66). The petitioner admitted on the stand that the interview occurred substantially as the newspaper reporter had testified (R. 185, 186).

On the same day, May 1st, at about 10:30 A. M., a representative of petitioner appeared at the office of the police commissioner of Birmingham and orally requested the police commissioner to furnish petitioner adequate police protection (R. 171), and at 11:05 A. M., of the same day, he confirmed his oral request for police protection by a telegram to the police commissioner in which he repeated that request and asked specifically for two officers during petitioner's "twenty-four hour stay in Birmingham" (R. 172).

The police commissioner ordered the Chief of Police to furnish appellant "plenty of police protection" (R. 172).

Petitioner arrived at the church where a meeting of the Southern Negro Youth Congress was being held at about 9:00 P. M. on May 1st (R. 92). The church had one entrance on the Seventh Avenue side of the building and another entrance on the 16th Street side of the building (R. 61). Also, see photograph of the church (R. 37, 38). The entrance on the Seventh Avenue side was marked with a sign reading "colored entrance" and the entrance on the 16th Street side was marked with a sign reading "white entrance" (R. 43). The record is clear that the entrance marked "white entrance" was not "at the rear of the building," as stated in petitioner's brief at page 4, but that such entrance was on the side of the building (R. 63). There was a sidewalk on the 16th Street side of the church just as there was on the Seventh Avenue side (R. 61). These sidewalks clearly appear in the photograph of the church (R. 37, 38). The entrance marked "white entrance" on the 16th Street side was nearer to the sidewalk than was the entrance marked "colored entrance" on the Seventh Avenue side (R. 61). The white entrance was accessible to the sidewalk (R. 61), and there was nothing between the sidewalk and the white entrance to prevent petitioner from entering the church at that entrance (R. 62). The statement on page 4 of petitioner's brief that the white entrance was "surrounded by grass and weeds" and that "there appears to have been no light nearby" is not supported by the record. The only reference to grass and weeds is a question propounded by petitioner's counsel as follows:

"Q. Isn't it a fact there was weeds and grass about that time?"

A. I imagine there was." (R. 64).

Counsel for petitioner asked the same witness whether there was a light at the white entrance (R. 63), and the witness answered:

"A. I am not sure, there could have been, since I am not sure." (R. 65).

A street light was located on the corner by the church (R. 32, 33), which is clearly visible in the photograph of the church (R. 37, 38), and this street light appears to be about equidistant from the two entrances (R. 37, 38).

There is nothing on page 34 of the record to substantiate the statement on page 4 of petitioner's brief that the colored entrance was "adequately lighted by lights from the interior of the building." On page 33 of the record it appears that there was a light inside the church but none on the porch at the colored entrance (R. 33). The light shone from inside the building onto the porch but there is no evidence as to the "adequacy" of the light (R. 33).

When petitioner arrived at the church he got out of a taxi at the corner and engaged in conversation with a group who were there to greet him (R. 176). As petitioner was leaving the group some one told him that he was approaching the colored entrance (R. 180, 186). Petitioner testified that he then decided to "*test the ordinance*" and he proceeded to walk toward the colored entrance (R. 186, 187).

The evidence shows without dispute that W. W. Casey, a police officer of the City of Birmingham, in police uniform with cap and badge and on duty at the time, was standing at the colored entrance as petitioner approached that entrance (R. 29, 32, 70, 102). The petitioner testified that Officer Casey was in uniform and that "I was well aware he was a police officer" (R. 190).

What occurred at the door of the church is of vital importance in this case and we will state somewhat in detail what happened there.

Officer Casey testified that he was standing at the door at the colored entrance as petitioner started walking up the sidewalk toward the entrance (R. 30). Officer Casey continued his testimony as follows: (R. 30).

Q: As he (petitioner) left the group out there with whom he had the conversation, what did he do?

A: He walked towards me, when he got three or four feet of me I told him this is the colored entrance and the white entrance is around on the side and that he would have to use that entrance.

Q: What did he do?

A: He didn't do anything, continued walking, didn't say anything. He got up to me and I repeated it to him and he says I will use this entrance, when he did I stepped over in front of the door, and he knocked me back against the wall. (R. 30).

Officer Casey's testimony continues: (R. 31).

Q: Now you said he knocked you back against the wall, tell you in what manner he knocked yoy back or struck you, whatever he did?

A: He lowered his right shoulder and hit me, around my—I guess my chest and pushed me back a couple of steps.

Q: He knocked you back a couple of steps?

A: Yes, sir, then he went back some two or three steps and I braced myself and he come at me again and we went together. We were tus-ling around there and I believe that detective Darnell came up about then.

Q: He lowered his shoulder and struck you some where around your chest and knocked you back?

A: Yes, sir.

Q: Did you hit against anything?

A: No, I went back a couple of steps.

Q: You went back a couple of steps?

A: Yes, sir.

Q: You said he hit you again?

A: He came at me again, I was braced for him that time.

Q: What did you do the second time he struck you?

A: Well, he just kind of hit me and shoved me around, you know, and about that time detective Darnell came up on there with me, and we got off on the ground, I don't know how he got off on the ground. We started towards the sidewalk. (R. 32).

Officer Casey also testified that when the petitioner lowered his shoulder and knocked him back he (Casey) was standing *"directly in the center of the doorway"* (R. 33). On cross-examination Officer Casey repeated in detail and by demonstration how he was knocked backward by the petitioner (R. 45).

The testimony of all of the witnesses to the incident corroborates Officer Casey in all respects. Mr. Gene Wortsman, a reporter for the Birmingham Post, a daily newspaper, saw the incident and he testified that the petitioner knocked Officer Casey back against the doorway, "then they separated and went together again" (R. 68, 69). He also heard Officer Casey speak to the defendant before the defendant hit him (R. 67).

Mr. Roland W. Dopson, reporter for the United Press, also corrobrated the testimony of Officer Casey. He testified that Officer Casey was standing in front of the door (R. 80), and that the petitioner "lowered his shoulder and hit Officer Casey along in the chest somewhere, and knocked Officer Casey back a step or two * * *" (R. 78). *He also testified that prior to the time the petitioner's shoulder came in contact with Officer Casey, Officer Casey had not made any move or step towards the petitioner* (R. 78).

Mr. Leroy Simms, correspondent for the Associated Press in Birmingham, also heard Officer Casey tell the petitioner that "this is the negro entrance, the white entrance is on the side" (R. 93). He testified that the petitioner then *pushed into Casey with his shoulder* (R. 94). Casey stepped back about one step and the petitioner halted, then pushed into Casey the second time with his shoulder (R. 94). Mr. Simms further testified that he saw no mistreatment of the petitioner by the officers and no officer struck the petitioner and no officer used profanity (R. 95, 96).

Three other witnesses corrobrated the testimony of Officer Casey in all respects (R. 106, 134, 143).

The petitioner did not deny that the incident with Officer Casey happened in the manner detailed by all the other witnesses. He testified that Officer Casey told him he was at the colored entrance and would have to go to the side to the white entrance (R. 176). The petitioner testified that he then stated to Officer Casey, *"I am not particular about those things and I started to walk in"* (R. 176). The petitioner testified that he proceeded to walk in and tried to *"scrape by"* Casey, and that he tried a second time to go in (R. 176). The petitioner admitted that he used profane language (R. 177). A most important admission came from the petitioner after he had been questioned at length on cross-examination about his difficulty with Officer Casey; the petitioner stated:

> "I wouldn't dispute any of these other witnesses" (R. 184).

Only the petitioner and the other witnesses mentioned hereinabove testified with reference to the incident at the church door and the facts as related by Officer Casey are virtually undisputed.

After being struck twice by petitioner at the door Officer Casey grabbed petitioner around the waist and pinned him arms to his side (R. 78). Other police officers then came to the assistance of Officer Casey and petitioner was escorted from the porch toward the street (R. 69). As petitioner and the police officers walked across the yard they tripped over a strand of barbed wire and fell to the ground (R. 32). As petitioner rose to his feet he said, "You Son of a Bitches can't do this to me." (R. 107). Other witnesses related that he said, "Goddam Son of Bitches," or variations thereof (R. 32, 79, 95, 144).

Petitioner had his fist drawn back as if to strike, until police Officer McMahan laid his hand on petitioner's shoulder and told him that he was under arrest and had better come along peacefully (R. 144).

Officer McMahan then walked with petitioner to a police automobile (R. 144). Petitioner seated himself on the rear seat of the automobile (R. 145).

Officer McMahan testified as follows: (R. 145).

Q: He (petitioner) got in the car?

A: He got in the rear and set down as I told him to.

Q. Did he say anything further at that time?

A. Yes, he was talking very loud and he—I told him—I says buddy you better be *quite,* you are under arrest, you are going to start something we can't stop, the feeling of the negro here is running high.

Q. What did he say to that?

A. He reported, I don't give a goddam who hears me, I ask—

Q. What did you do then?

A. I ask Sarge-nt Moore at that time to take him away before something happened. (R. 145).

Petitioner was then taken to the city jail in the police automobile (R. 146), where he made an appearance bond and was released (R. 190).

The Trial Judge in the Circuit Court made it clear to the jury and to counsel that petitioner was not being tried for the violation of any segregation law, but was being tried upon the three charges contained in the complaint, viz, (1) disorderly conduct, (2) assault and battery, and (3) resisting an officer in the performance of his duty (R. 166, 174, 192). The jury returned a verdict of guilty on the disorderly conduct charge (R. 22, 23).

The Court of Appeals in its opinion (R. 201) points out that there is nothing in the record to support petitioner's contention that the police arrested petitioner in order to enforce the segregation ordinance (R. 206), nor that the police were attempting to prevent petitioner from making a speech (R. 206). The Court of Appeals further stated that the police did not use force to prevent petitioner's

entry to the Tabernacle, but that petitioner unjustifiably resorted to force (R. 208). The Court of Appeals also said:

> "There was no attempt to arrest the appellant until *after* he had assaulted the police officer by bumping into him and knocking him back a couple of steps against the wall. If this was appellant's idea of "testing" the segregation ordinance it was a method not available to him." (R. 206, 207).

On page 7 of petitioner's brief it is stated that it is clear from the opinion of the Court of Appeals that in the Court's view neither petitioner's use of profanity nor his alleged "struggles" with the police in the churchyard were considered by the Court as elements of the offense for which petitioner was convicted. We find nothing in the opinion of the Court of Appeals indicating such a view by the Court. On the contrary the Court of Appeals in its opinion specifically refers to the profanity used by petitioner after he tripped over the wire (R. 205), and also the fact that petitioner drew his fist back at the time he used such profanity (R. 205). The Court further refers to the continuing struggle of petitioner with police officers in the churchyard (R. 205), and to petitioner's use of profanity in the police automobile when admonished to keep quite (R. 205). We find no intimation that the Court of Appeals did not consider these as elements of the offense of disorderly conduct.

SUMMARY OF THE ARGUMENT

1. This record presents a simple case of assault and battery by petitioner upon a police officer, the use of profanity by petitioner, and conduct and profanity by petitioner in a police automobile tending to a breach of the peace, all embraced within a charge of disorderly conduct. The de-

cision of the State Court rests upon a completely non-federal ground. It appears clearly from the opinion of the State Court and the record that the police officer had made no move toward petitioner and had in no way attempted to place petitioner under arrest prior to the assault and battery committed by petitioner upon the police officer. The opinion of the State Court and the record show that there is no federal question involvel in this case. This Honorable Court should refuse to take jurisdiction and should deny the writ.

2. Petitioner cannot justify his assault and battery upon the police officer even if it be assumed, for purposes of argument, that petitioner had a legal right to enter the church through the entrance at which the police officer stood. Such unlawful method of testing or asserting a right is unknown to the law. It is a universal rule of law that a person cannot lawfully commit an assault and battery or create a breach of the peace amounting to disorderly conduct in order to "test" his legal rights.

3. If petitioner desired to "test" the constitutionality of the segregation ordinance, as he testified, he had several legal and non-violent methods he might have pursued, none of which involved assault and battery or breach of the peace. A civil suit for damages under Title 8, U. S. Code, Section 43, was available to petitioner as a means of testing the ordinance. Also, a bill for an injunction against the enforcement of the ordinance might have been filed. A criminal prosecution under Title 18, U. S. Code, Section 52, would also afford a means of testing the ordinance. These means of "testing the ordinance" are mentioned because petitioner in his brief advances the strange theory that petitioner had to use force against the police officer in order to "vindicate what he believed to be his constitutional rights" and to "test the ordinance."

ARGUMENT

I

THIS RECORD PRESENTS A SIMPLE CASE OF ASSAULT AND BATTERY BY PETITIONER UPON A POLICE OFFICER, THE USE OF PROFANITY BY PETITIONER, AND CONDUCT AND PROFANITY BY PETITIONER IN A POLICE AUTOMOBILE TENDING TO A BREACH OF THE PEACE, ALL EMBRACED WITHIN A CHARGE OF DISORDERLY CONDUCT. THE DECISION OF THE STATE COURT RESTS UPON A COMPLETELY NON-FEDERAL GROUND AND THIS HONORABLE COURT SHOULD REFUSE TO TAKE JURISDICTION AND SHOULD DENY THE WRIT.

As set forth in the opinion of the Court of Appeals of Alabama (R. 201) the arrest, prosecution and conviction of petitioner arose out of petitioner's assault and battery upon a police officer of the City of Birmingham, and petitoner's subsequent use of profanity and menacing gestures. Much of petitioner's brief is devoted to a characterization of petitioner's arrest as an attempt to enforce the segreation ordinance of the City of Birmingham. The opinion of the Court of Appeals disposes of this contention of petitioner by referring to the undisputed fact that "there was no attempt to arrest the appellant (petitioner) until after he had assaulted the police officer by bumping into him and knocking him back a couple of steps against the wall" (R. 206, 207). Mr. Roland W. Dopson, a reporter for the United Press, and a completely disinterested witness, testified that prior to the time the petitioner's shoulder came in contact with Officer Casey, Officer Casey had not made any move or step toward the petitioner (R. 78). And petitioner was not told that he was under arrest prior to that time for on page 5 of petitioner's brief it is stated that pe-

titioner was informed for the first time that he had been arrested only after petitioner had tripped over the wire in the churchyard (R. 144). Petitioner seems to complain of the fact that after petitioner had assaulted Officer Casey twice and other police officers had come to the aid of Officer Casey and had commenced to escort petitioner toward the sidewalk petitioner was not immediately informed that he was under arrest or informed of the nature of the charge. The assault and battery was committed in the presence of the several police officers and an officer may arrest any person without a warrant, on any day and at any time, for any public offense committed, or breach of the peace threatened in his presence. Sections 154, 155, Title 15, Code of Alabama 1940; *Williams v. State,* 35 So. 2d 564, 33 Ala. App. 304.

A police officer is not under the duty to inform the person arrested for an offense committed in his presence of the nature of the charge.

Section 155, Title 15, Code of Alabama 1940.
Lakey v. State, 24 Ala. App. 273, 134 So. 455.
Rutledge v. Rowland, 161 Ala. 114, 49 So. 461.

Also, when the official capacity of the arresting officer is known to the person arrested a statement of the officer's authority is not required.

Williams v. State, 33 Ala. App. 304, 35 So. 2d 564.
Sanderson v. State, 168 Ala. 109, 53 So. 109.

And petitioner, in reference to Officer Casey, said:

"Yes, he had some part of his uniform, I was well aware he was a police officer." (R. 190).

Petitioner's brief refers to cases holding that a person may use reasonable force in resisting an unlawful arrest. Such cases are inapposite here. When petitioner assaulted Officer Casey twice Officer Casey had made no move or

step toward petitioner (R. 78), and had not told petitioner he was under arrest (Petitioner's Brief page 5). No arrest, lawful or unlawful, had been made or attempted by Officer Casey or any other officer prior to petitioner's assault and battery on Officer Casey (R. 78). The applicable rule of law is that stated in *Harris v. State*, 95 S. E. 268, 21 Ga. App. 792, as follows:

> "The officer must, by some physical attempt, endeavor to make the unlawful arrest before the other person can unlawfully strike him or otherwise resist him by the use of physical force."

See also *People v. Tepperman*, 273 NYS 690, 151 Misc. 810. This rule is stated at 6 C. J. S., page 949, Assault and Battery; also at 27 C. J. S., page 286, Disorderly Conduct.

In addition to the assault and battery committed upon Officer Casey, petitioner was guilty of other conduct proscribed by the disorderly conduct ordinance. Section 311 of the 1944 Code of City of Birmingham (Appendix). After tripping over a wire in the churchyard, petitioner began using profanity directed at the police officers (R. 32, 79, 95, 107, 144). Petitioner also had his fist drawn back as if to strike (R. 144). When seated in the police automobile petitioner was talking loud and Officer McMahan asked him to be quiet (R. 145). Officer McMahan told petitioner that he might start something the police could not stop, as feelings "were running high" (R. 145). In this tense situation petitioner's reply was:

"I don't give a goddam who hears me" (R. 145).

All of this was properly considered by the court and jury in determining whether petitioner was guilty of disorderly conduct.

It is clear from the opinion of the Court of Appeals (R. 201) that this case was rightly decided on non-federal grounds.

This Honorable Court has adhered to the rule that it will not review a state court decision resting on an adequate and independent non-federal ground. *Lynch v. New York, ex rel. Pierson,* 55 S. Ct. 16, 293 U. S. 52, 79 L.ed 191; *Radio Station WOW, Inc. v. Johnson,* 65 S. Ct. 1475, 326 U. S. 120, 89 L.ed. 2092; *Winkler v. Maryland,* 69 A. 2d 674, cert. denied March 27, 1950, 70 S. Ct. 621, 94 L.ed 505.

We respectfully submit that the application of such rule to the instant case will result in a denial of the writ. This Honorable Court may, of course, look to the record to determine whether the State Court has evaded any federal question. We invite such an inspection of the record in this case for we are confident that it will serve to emphasize the point that petitioner was prosecuted and convicted of an offense wholly disassociated from any federal constitutional implication.

II

PETITIONER CANNOT JUSTIFY HIS ASSAULT AND BATTERY UPON OFFICER CASEY EVEN IF IT BE ASSUMED THAT PETITIONER HAD A LEGAL RIGHT TO ENTER THE CHURCH THROUGH THE ENTRANCE IN WHICH OFFICER CASEY STOOD. SUCH UNLAWFUL METHOD OF TESTING OR ASSERTING A RIGHT IS UNKNOWN TO THE LAW.

This principle has been enunciated in cases involving various situations. In *State v. Bradbury,* 74 P. 231 (Supreme Court of Kansas), the defendant had been wrongfully deprived of the possession of his real property by plaintiff. In his efforts to regain possession defendant committed an assault upon plaintiff. In holding defendant guilty of assault and battery the court said:

> "While one rightfully in possession of property may defend his possession against an attack, and while one

lawfully entitled to the possession of real property may, if he can, enter and take peaceable possession, yet, no matter what lawful right to possession one out of the actual possession of real property may have, he will not be justified in making a forcible entry and committing a breach of the peace in ejecting by force an actual occupant. *Such unlawful method of testing a legal right is unknown to the law.*" (Emphasis added).

And we remind this Honorable Court that petitioner testified that when he walked toward the entrance where Officer Casey stood, and where petitioner later assaulted Officer Casey, petitioner "only wanted to test the ordinance" (R. 186, 187).

In *Sabre v. Mott,* 88 Fed. 780, the owner of an item of personal property, a written contract, committed an assault and battery upon a person who wrongfully withheld possession from him. In sustaining a judgment against the owner of the contract the court quoted from Blackstone's Commentaries (3 Blackstone's Commentaries, 4) as to the right of an owner to re-take personal property as follows:

"If, therefore, he can so contrive as to gain possession of his property again, without force or terror, the law favors and will justify his proceeding." But the right should never be exerted "where such exertion must occasion strife and bodily contention, or endanger the peace of society."

The court said further:

"So, no right to the contract, however absolute, would justify taking it by force from the plaintiff's person and much less would it justify any assault upon his person to compel delivery of it; and there was no question about the ownership of the paper, or the amount of force necessary to retake it, to submit to the jury, upon the evidence, as decisive for the defendant of the justification set up."

The decisions of this Honorable Court have recognized and applied this rule of law. In *Denver & R. G. Ry. Co. v. Harris*, 7 S. Ct. 1286, 122 U. S. 597, 30 L.ed. 1147, it was held that regardless of the title or right to possession violence and force constituting a breach of the peace could not lawfully be employed in an effort to regain possession. To like effect is *Iron Mountain and Helena Railroad Company v. Johnson*, 7 S. Ct. 339, 119 U. S. 608, 30 L.ed 504.

The same rule has been recognized in cases involving personal rights as distinguished from attempted recoveries of real or personal property. In 27 C. J. S. at page 286, Disorderly Conduct, it is stated:

> "One protesting against a policeman's unlawful action, however, must do it in such a way as not to create a public disturbance amounting to disorderly conduct."

Several cases illustrate the application of this rule. In *Commonwealth v. Cooper*, 95 Pa. Super. 382, police officers entered a hall for the purpose of forbidding a meeting being held there. Following the entry of the police a disturbance occurred and certain persons were charged with disorderly conduct. The court sustained the conviction and stated as follows:

> "Assuming, without deciding, that the action of the police in entering the hall and forbidding the meeting, before there was any actual disturbance or imminent breach of the peace, was illegal, it was not the immediate cause of the demonstration which disturbed the peace and quiet of the neighborhood and annoyed the traveling public. *That was occasioned by the noisy, boisterous, and disorderly conduct of these appellants following the action of the police. The illegal action of the police, assuming it was illegal, furnished no justification or excuse for a disorderly demonstration such as these appellants resorted to.* There was a legal and orderly way of determining the legality of the police's action; but these appellants wanted none of it. They were apparently de-

sirous of the outcome which resulted. They secured the crowd which otherwise they would not have had, and obtained the arrests for which they were clamoring. While they had a right to protest against the unwarranted action of the police, they could not do so in such a manner as to make themselves disturbers of the peace and good order of the neighborhood. The cause of their protest against the police will not excuse or condone the disorderliness of their subsequent conduct and consequent annoyance to the neighborhood and the traveling public. *One may protest against the actions of a policeman who unwarrantedly tells him to "move on", but he must do it in such a way as not to create a public disturbance or amount to disorderly conduct.*" (Emphasis added).

A similar case to that of Commonwealth v. Gadson, 67 Pa. Super. 459. In this case a detail of police officers was assigned to prevent any person under the age of twenty-one years attending a particular meeting. The police officers refused to permit a girl who appeared to be under 21 to enter the hall. A disturbance resulted and the charge of disorderly conduct was filed. The Court sustained the conviction, and in its opinion the Court said as follows:

"Although the action of the police in forbidding those under twenty-one years of age to attend the meeting may have been illegal, it was not the immediate cause of the arrest of these two defendants. This was brought about as a result of their own actions which led to the disturbance. There were loud, boisterous and unseemly noises sufficient to disturb the public peace. The action of the police was no justification or excuse for the disorder which took place. Instead of complying with the request of the police officers, they saw fit to protest in a way which only led to trouble."

o o o

"In Com. V. Cooper, et al. 95 Pa. Superior Ct. 502, we had a case similar in principle to this one except that in the case cited permission for the meeting had been refused and the disorder was considerably more excessive. We need not repeat at length what was there said as the

effect that the justice of a protest against unwarranted orders and actions of policemen cannot justify a public disturbance or disorderly conduct upon the part of the protestants. Fair-minded persons might well differ about the conclusions to be drawn from the evidence in this record against appellant but we cannot say there was no evidence to support his conviction." (Emphasis added).

To the same effect is the case of *People v. Sadowski*, 267 N. Y. S. 762, 149 Misc. 583, and also the case of *People v. Tepperman*, 273 N. Y. S. 690, 151 Misc. 810.

III

IF PETITIONER DESIRED TO "TEST" THE CONSTITUTIONALITY OF THE SEGREGATION ORDINANCE, AS HE TESTIFIED, HE HAD SEVERAL LEGAL AND NON-VIOLENT METHODS HE MIGHT HAVE PURSUED, NONE OF WHICH INVOLVED ASSAULT AND BATTERY OR BREACH OF THE PEACE.

As we understand petitioner's brief it virtually admits that petitioner used force against Officer Casey in attempting to enter the church. On page 5 of petitioner's brief it is stated that "the petitioner did not deny that he resisted the attempt to prevent him from entering the Tabernacle through the front door, * * *." When viewed in the light of the undisputed evidence as to what occurred at the Tabernacle entrance, as set forth in "Statement of the Case," it is obvious that the word "resisted," as used in petitioner's brief, can mean only that petitioner aggressively charged into Officer Casey in an effort to knock Officer Casey out of the way and thereby to gain forcible entry to the Tabernacle. (R. 30, 31, 68, 69, 78, 79, 94, 105, 134, 145, 176).

Again, the footnote on page 18 of petitioner's brief refers to the remark by the Court of Appeals that if bumping into Casey "was appellant's idea of 'testing' the ordinance, it

was a method not available to him" (R. 206). This observation is then made in the footnote:

> "The Court does not indicate why the time honored method of testing the constitutionality of a law by violating it was not available to petitioner. Nor does it suggest any other method. Indeed, there was none. *Petitioner was confronted with the choice of attempting to enter the church over Casey's opposition or abandoning the effort to vindicate what he believed to be his constitutional rights.*" (Emphasis added).

And on page 27 of petitioner's brief:

> "As we have already shown the threatened or actual breach of the peace, if any, was not occasioned by petitioner, but by the illegal action of the police in barring his entry into the Tabernacle. *Had they permitted petitioner to enter unhindered, and then arrested him for violating the ordinance, no breach of the peace would have occurred.*" (Emphasis added).

We refer to these excerpts from petitioner's brief to show that, aside from the evidence, the attitude expressed in petitioner's brief seems to be that the assault and battery committed by petitioner upon Officer Casey, or the breach of the peace occurring at the church entrance, was necessary if petitioner were to "test" the segregation ordinance.

It would certainly be a dangerous precedent for any court to recognize as lawful the commission of an assault and battery to test or assert a legal right.

If petitioner was of the opinion that Officer Casey's presence in the doorway of the church was for the purpose of enforcing the segregation ordinance and petitioner felt impelled "to test the ordinance" as he testified (R. 186, 187), there were several legal and non-violent methods available, none of which involved the extra-legal process of committing an assault and battery or creating a breach of the peace.

Title 8, U. S. Code, Section 43, gives a right of action against any person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory,

subjects, or cause to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privilege or immunities secured by the constitution and laws; this right of action includes action at law, suit in equity, or other proper proceeding for redress. This section gives a right of action sounding in tort and the jury may award exemplary or punitive damages. *Hague v. Committee for Industrial Organization*, 101 Fed. 2d 774, 59 S. Ct. 954, 307 U. S. 496, 83 L.ed 1423. If petitioner felt that Officer Casey had deprived him of constitutional rights, privileges, or immunities when Officer Casey told petitioner that he would have to use the white entrance, petitioner could have "tested the ordinance" by means of a civil suit under this section of the U. S. Code.

Or, petitioner could have proceeded in the Federal District Court for an injunction against the enforcement of the ordinance he regarded as unconstitutional. *Hague vs. Committee for Industrial Organization*, 59 S. Ct. 954, 307 U. S. 496, 83 L.ed 1423.

A criminal prosecution under Title 18, Section 52, U. S. Code, for deprivation of constitutional rights or privileges was a third method by which petitioner could have "tested" the ordinance and could have obtained redress, if he were legally entitled to redress.

We mention these legal means of "testing the ordinance" only because petitioner in his brief has advanced the strange theory that petitioner had to use force against Officer Casey in order to "vindicate what he believed to be his constitutional rights" (petitioner's brief, page 18) and to "test the ordinance" (R. 186, 187). We respectfully submit that any recognition of the right of a citizen to resort to force, assault and battery, and breach of the peace to vindicate what he considers to be his rights would lead to a state of anarchy. Orderly process of law and the courts have been provided for the vindication of such rights.

CONCLUSION

We respectfully submit that the opinion of the Court of Appeals of Alabama and the record show clearly that petitioner was prosecuted and convicted of disorderly conduct for assaulting a police officer and for using profanity and making threatening gestures. It is clear that the State Courts have not evaded any constitutional issues. The opinion and record show conclusively that petitioner's arrest, prosecution and conviction for disorderly conduct was not in fact or in form an effort to enforce a segregation ordinance.

Even if it be assumed, for purposes of argument, that petitioner had a legal right to enter at the door where Officer Casey stood, petitioner had no legal right to force an entrance by assaulting Officer Casey.

We respectfully submit that this Honorable Court should deny the petition for writ of certiorari as no federal question is involved in this case.

Respectfully submitted,

Thomas E. Huey, Jr.

THOMAS E. HUEY, JR.,
City Hall
Birmingham, Alabama
Attorney for Respondent

APPENDIX

General City Code of Birmingham

Disorderly Conduct Ordinance

Section 311.

Any person who disturbs the peace of others by violent or offensive conduct, or carriage, or by loud or unusual noises, or by profane or obscene or offensive language, or any person who shall commit any act or diversion causing or tending to a breach of the peace, or any person who shall be guilty of lewd, immoral or indecent conduct, or any person who shall use any obscene or filthy language in a public place, or any person who shall commit any act or diversion tending to or calculated to debauch the morals of any person, shall be deemed guilty of disorderly conduct, and, upon conviction, shall be punished as provided in section 4 of this code.

Section 4.

Any person who shall fail or neglect to perform any duty imposed by this code, or who shall fail or neglect to do or perform any act or series of acts required to be done or performed by this code, or who shall fail or neglect to perform any duty, act or series of acts, the neglect or failure of performance of which is declared unlawful or made punishable by this code, or who shall do or perform any act or series of acts which is prohibited, made unlawful or made a misdemeanor by this code, or who shall violate any provision of this code, shall, upon conviction therefor, be punished by a fine not exceeding one hundred dollars or by imprisonment in the city jail, workhouse or house of correction or at hard labor upon the streets or public works for not exceeding six months, or by both such fine and im-

prisonment; and, in the event the fine costs are not presently paid the defendant shall be required to work out the fine and costs under the direction of the city authorities, allowing one dollar for each day's service. No female shall be required to work on the streets of the city. The penalties provided in this section shall apply in all cases other than offenses for which a different penalty is specifically prescribed; provided, that the provisions of this section shall not apply to violations of official duty imposed by this code upon officers or employees of the city as such, unless the provision imposing the duty also expressly makes the violation thereof unlawful or punishable.

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IN THE

Supreme Court of the United States

October Term, 1949

No. 111

GLEN H. TAYLOR,

Petitioner,

vs.

CITY OF BIRMINGHAM, ALABAMA.

BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI.

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The National Association for the Advancement of Colored People files this brief as *amicus curiae*, consent to do so having been granted by counsel for petitioner and respondent. The National Association for the Advancement of Colored People is interested in the issue of state-enforced racial segregation here presented because racial segregation is a central problem in the field of race relations in which the Association has labored for more than forty years. During its long and intimate concern with problems of racial disharmony, the Association has fought segregation with every legitimate weapon at its command because racial separation not only frustrates the practice of democracy at home, but because it also—at great cost to

the nation—impairs the regard in which America is held abroad. It is filing this brief because it believes that the state-enforced separation, upon which the prosecution herein is based, should be struck down by this Court, and that the petition for certiorari should be granted.

The Association is of the opinion that the issues presented are adequately discussed in petitioner's brief. Herein it merely desires to state its concurrence in the arguments there presented, and to perhaps touch upon some new matter.

The facts are presented in petitioner's brief (pp. 3-6), and there is no need to repeat them here. They make it clear that petitioner's arrest was for the purpose of enforcing Section 369(b) of the 1944 Code of the City of Birmingham (see Appendix A). Any interpretation which founds the arrest and conviction upon grounds not including this statute is an attempt to substitute illusion for substance. This Court has demonstrated that where civil rights are involved it will characterize the facts itself and base its decision on the real issues. For example, in cases involving the rights of Negroes to vote in so-called "white primaries", despite the characterization of certain political parties as private clubs by state and inferior federal courts, this Court immediately went to the real issue (*Smith* v. *Allwright*, 321 U. S. 649; *Nixon* v. *Condon*, 286 U. S. 73 (1932)).

As *amicus curiae*, the Association urges that certiorari be granted for the reason that the decision of the state court below is in conflict with applicable decisions of this Court. A federal question of substance—the constitutionality of Section 369 of the 1944 Code of the City of Birmingham, which orders racial segregation—has been decided by the Supreme Court of the State of Alabama despite its disavowals of this fact. This question has been decided

in a way not to avoid with applicable decisions of this Court—which have consistently struck down racial segregation and discrimination. These cases, be they concerned with transportation (*Morgan v. Virginia*, 328 U. S. 373), education (*Sweatt v. Painter*, ___ U. S. ___, 70 Sup. Ct. 848; *McLaurin v. Oklahoma*, ___ U. S. ___, 70 Sup. Ct. 851), voting (*Smith v. Allwright*, *supra*; *Terry v. Adams*, *supra*), zoning (*Buchanan v. Warley*, 245 U. S. 60), or restrictive covenants (*Shelley v. Kraemer*, 334 U. S. 1), have asserted and demonstrated that state-enforced racial segregation is repugnant to the Constitution. Therefore, the action of the State of Alabama in upholding racial segregation in the face of this Court's uniform disapproval thereof is in conflict with applicable decisions of this Court.

It may be argued that the conflict is merely one of principle and not a real conflict in the application of the rules of law. (See Stern and Gressman, Supreme Court Practice (1950), p. 199.) *Amicus curiae* urges that this is not the case. Segregation is essentially the same wherever practiced. By one means or another the Court has given it essentially the same treatment whenever the question has been presented. The decision of the Supreme Court of Alabama upholds state-enforced segregation—the decisions all cited above struck down segregation.

However, if the Court is of the opinion that a conflict of decisions concerning segregation in public assembly is the conflict required to grant certiorari in this case, then another reason presents itself for which certiorari should be granted. There are no decisions in this Court of which *amicus curiae* knows dealing with this specific matter. In a matter of such transcendent importance, a declaration of the law as to state-enforced segregation in public assembly would be of utmost importance. The importance and need for such a declaration need not be set forth in detail. The

Court is fully aware of them—it has demonstrated this awareness by its consideration of case after case dealing with the race relations problem.

Respectfully submitted,

THURGOOD MARSHALL,
CONSTANCE BAKER MOTLEY,
JACK GREENBERG,
Attorneys for National Association for the Advancement of Colored People.

APPENDIX A
General City Code of Birmingham

Segregation Ordinance

SECTION 369. SEPARATION OF RACES.

(a) It shall be unlawful for any person in charge or control of any room, hall, theatre, picture house, auditorium, yard, court, ball park, public park, or other indoor or outdoor place, to which both white persons and Negroes are admitted, to cause, permit or allow therein or thereon any theatrical performance, picture exhibition, speech, or educational or entertainment program of any kind whatsoever, unless such room, hall, theatre, picture house, auditorium, yard, court, ball park, or other place, has entrances, exits and seating or standing sections set aside for and assigned to the use of white persons, and other entrances, exits and seating or standing sections set aside for and assigned to the use of Negroes, and unless the entrances, exits and seating or standing sections set aside for and assigned to the use of white persons are distinctly separated from those set aside for and assigned to the use of Negroes, by well defined physical barriers, and unless the members of each race are effectively restricted and confined to the sections set aside for and assigned to the use of such race.

(b) It shall be unlawful for any member of one race to use or occupy any entrance, exit or seating or standing section set aside for and assigned to the use of members of the other race.

(c) It shall be unlawful for any person to conduct, participate in or engage in any theatrical performance, picture

exhibition, speech, or educational or entertainment program of any kind whatsoever, in any room, hall, theatre, picture house, auditorium, yard, court, ball park, public park, or other indoor or outdoor place, knowing that any provision of the two preceding subdivisions has not been complied with.

(d) The chief of police and members of the police department shall have the right, and it shall be their duty, to disperse any gathering or assemblage in violation of this section, and to arrest any person guilty of violating the same.